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ship which he does not advance, it is forever lost to him. The French permit him to defend on one claim of title in the first suit, and should he lose, he may sue on whatever other claims he many have.

c) One who attacks the validity of a written instrument is required by the common law to advance all his grounds of invalidity in one suit;⁸⁵ in France, this view has been adopted by only two obscure commentators, one of whom subsequently abandoned it.⁸⁶ The modern view in France permits a separate suit or defense on each vice, and even the view which formerly prevailed was much more liberal than the common law.

CLAUDE O'QUIN

[This Comment will be concluded in a forthcoming issue of the LOUISIANA LAW REVIEW, with a discussion of the Louisiana jurisprudence.]

REMISSION IN THE CIVIL LAW

LOUISIANA CIVIL CODE OF 1870:

ART. 2100. The creditor, who consents to the division of the debt with regard to one of the codebtors, still has an action in solido against the others, but under the deduction of the part of the debtor whom he has discharged from the debt in solido.

ART. 2101. The creditor, who receives separately the part of one of the debtors, without reserving in the receipt the debt in solido or his right in general, renounces the debt in solido, only with regard to that debtor.

The creditor is not deemed to remit the debt in solido to the debtor when he receives from him a sum equal to the portion due by him, unless the receipt specifies that it is for his part.

The same is to be observed of the mere demand made of one of the codebtors, for his part, if the latter has not acquiesced in the demand or if a judgment has not been given against him.

ART. 2203. The remission or conventional discharge in favor of one of the codebtors in solido, discharges all the

85. It is not clear whether this is on the basis of *res judicata* as a bar, or estoppel by judgment; see *supra*, note 33.

86. See note 53, *supra*.

others, unless the creditor has expressly reserved his right against the latter.

In the latter case, he can not claim the debt without making a deduction of the part of him to whom he has made the remission.¹

In answer to a suggestion that these articles are in conflict, the Louisiana Supreme Court said in *Fridge v. Caruthers*:²

"If there be such conflict, then it clearly behooves us to choose which of the two articles we should follow; and, having once so chosen, consistency would then require us to adhere to that choice. . . .

". . . Our predecessors have uniformly chosen to follow article 2203, and not article 2100."

Chief Justice O'Niell concurred, but found no conflict between the articles, although he assigned no reasons for his conclusion.

The following hypotheses may serve to illustrate the problem: A, B, and C are indebted in solido to D, who

(1) Divides the debt in favor of A, or receives the latter's share and gives him a receipt "for his part";

(2) Discharges the debt, giving notification thereof only to A;

(3) Grants to A a "full and complete discharge from all liability," either gratuitously or upon receipt of a payment from him, without expressly reserving his right against the other codebtors.

In order properly to consider these hypotheses, it is necessary to understand the three concepts into which remissions to solidary obligors may be divided: remission of the solidarity, remission of the debt, and remission of a part to the benefit of only one of the codebtors.³

1. Arts. 2100, 2101, 2203, La. Civil Code of 1870, are literal translations of Arts. 1210, 1211, 1285, respectively, of the French Civil Code. Compare Arts. 2096, 2097, 2199, La. Civil Code of 1825, in which the French version is the same as the articles of the French Civil Code. The English version remains unchanged in the Code of 1870.

2. 156 La. 746, 752, 101 So. 128, 131 (1924).

3. 5 Demante, Cours Analytique de Code Civil (2 ed. 1883) 231, n° 144 bis. I, states: "On peut comprendre trois sortes de remises, ou de renonciations gratuites de créancier d'une dette solidaire à ses droits. 1° Remise de la dette entière; 2° remise de la part au profit de l'un des codébiteurs; 3° remise de la solidarité."

(Translation) "There are understood three kinds of remissions, or gratuitous renunciations of his rights by the creditor of a solidary debt. (1) Remission of the entire debt; (2) remission of part to the benefit of one of the codebtors; (3) remission of the solidarity."

Cf. 2 Pothier, Oeuvres (2 ed. 1861) 129, Traité des Obligations, n° 275.

REMISSION OF THE SOLIDARITY⁴

Since solidarity among debtors is established in favor of the creditor, the latter may relinquish it by consenting to a division of the debt.⁵ If such consent is given to all of the debtors the solidarity is destroyed and each remains liable only for his part of the debt.⁶ If there are more than two solidary debtors and the creditor consents to a division of the debt in favor of only one of them, the solidarity is destroyed as to him alone, the others remaining liable each for the whole of the remainder.⁷ Inasmuch as a division of the debt, which the French writers generally call "remission of the solidarity," is granted in favor of the individual or individuals concerned, Pothier has described it as a form of *personal remission*.⁸

The creditor's consent to the division of the debt in favor of one of the codebtors may be conferred either expressly or tacitly.⁹ Such consent may result tacitly if the creditor, on receiving payment by one debtor of his share, gives a receipt

4. "Debt in solido" is the English translation given to the word "*solidarité*" in the French version of Articles 2096 and 2097 of the La. Civil Code of 1825. "Solidarity" seems to express the concept more accurately, since it obviates confusion of "remission of the debt in solido" (solidarity) with "remission of the debt."

For a discussion of "remission of the debt," see *infra*, pp. 368-369.

5. 2 Pothier, *op. cit. supra* note 3, at 131, n° 277.

6. The effect of this division of the debt is to change the obligation from solidary to joint. 2 Pothier, *op. cit. supra* note 3, at 327, n° 617; 5 Demante, *op. cit. supra* note 3, at 231, n° 144 *bis*. I; 2 Planiol, *Traité Élémentaire de Droit Civil* (11 ed. 1937) 270, n° 773. 17 Laurent, *Principes de Droit Civil Français* (2 ed. 1876) 346-347, nos 344-346, classifies renunciations of solidarity into two classes, absolute and relative; it is absolute when it is granted to all, a case seldom, if ever, occurring so that it is not even provided for in the law; it is relative when granted to only one, or less than all, a case covered by Articles 1210 and 1211 of the French Civil Code.

7. *Baldwin v. Gray*, 4 Mart. (N.S.) 192 (La. 1826); *Benton v. Roberts*, 1 Rob. 101 (La. 1841). These cases were decided in accordance with Articles 2096 and 2097 of the La. Civil Code of 1825 (now Articles 2100 and 2101), although the articles were not cited therein.

8. Pothier defines *real remission* as a case where the creditor declares the debt to be extinguished, as if he had received payment, although he has not. *Personal remission* is the one by which the creditor simply discharges the debtor of his obligation. Thus, according to Pothier, the remission of the debt to one frees all the solidary debtors, whereas, the remission which discharges only one debtor of his obligation is personal as to him and may not be invoked by any of the others; the *personal remission* being applicable to remission of the solidarity as well as to remission of the debtor's obligation. He depended upon the intention of the creditor to determine whether the remission was personal or real. 2 Pothier, *op. cit. supra* note 3, at 327, nos 616, 617.

Compare this latter theory of Pothier with Article 2203, La. Civil Code of 1870.

9. 17 Laurent, *op. cit. supra* note 6, at 347, 350, nos 345, 348. Article 2100 governs express remission and Article 2101 is applicable to tacit remission.

stating that it is "for his part";¹⁰ but the mere acceptance by the creditor of one debtor's share without such a statement in the receipt would not be sufficient to release him from solidary liability.¹¹

The effect of a division of the debt, whether express or tacit, in favor of one solidary codebtor is to discharge him alone from the solidarity. The others remain liable in solido but only for the remainder after deducting the share of the debtor who has been released from the solidarity. This is the kind of remission spoken of in Articles 2100 and 2101.

Since consent to the division of the debt in favor of one of one of the solidary debtors operates to release only him from the solidarity, a consequence of such a remission is that, if thereafter one of the others becomes insolvent, the debtor granted the benefit of division must yet bear his share of the portion due by the insolvent.¹²

REMISSION OF THE DEBT

Instead of merely consenting to a division of the debt in solido (or remission of the solidarity), a creditor may dispossess himself of it entirely.¹³ This he may do in return for something promised or received, or purely gratuitously.¹⁴ Since there cannot be a debtor without a debt, a release or extinguishment of the

10. "Payment in full of Mr. Gray's separate account" in a receipt was held to release Gray from the solidarity. *Baldwin v. Gray*, 4 Mart. (N.S.) 192 (La. 1826).

Compare 2 Pothier, op. cit. supra note 3, at 131, n° 277, where he says that "without prejudice to the solidarity" does not apply to the other debtors, but is a reservation of the solidarity against the one paying and overcomes the presumption of tacit remission.

11. Article 2101, La. Civil Code of 1870. 5 Demante, op. cit. supra note 3, at 248, n° 154 bis. I; 17 Laurent, op. cit. supra note 6, at 350, n° 348; 4 Marcadé, *Explication Théorique et Pratique du Code Civil* (7 ed. 1873) 509, Bk. III, tit. III, n° 621.

12. Article 2105, La. Civil Code of 1870. An understanding of this is important in the situation where the debtor has paid *his part*, because if he were no longer liable for his share in the support of the insolvent's part, he would be in the same situation as one who had been granted a remission of a part to his benefit. For a discussion of this latter type of remission, see *infra*, p. 369 et seq.

13. 17 Laurent, op. cit. supra note 6, at 347-348, n° 346: "*Quand le créancier fait remise de la dette à l'un des débiteurs solidaires, cette remise a effet à l'égard des autres, tous sont libérés. Quand il fait remise de la solidarité à l'un d'eux, cette remise n'a pas d'effet à l'égard des autres, ils restent tenus solidairement.*"

(Translation) "When the creditor remits the debt to one of the solidary debtors, this remission has effect with regard to the others; all are liberated. When he remits the solidarity to one of them, this remission has no effect with regard to the others; they remain solidarily liable."

14. The gratuitous discharge is called by the French a *remission* of the debt.

debt discharges the debtors.¹⁵ This is of course true also of solidary obligations. In this case a relinquishment of the debt may occur in a transaction between the creditor and all of the solidary debtors, or when the creditor is dealing with only one of them, the result in either event being a discharge of all. Because this is a remission of the thing which is the object of the relations between the parties, Pothier called it a *real remission*.¹⁶

So far no difficulty has appeared. The first hypothesis given at the beginning of this comment clearly falls within the intentment of Articles 2100 and 2101;¹⁷ the second hypothesis results in a discharge of all of the codebtors, since there may not be a debtor after the extinguishment of the debt. Difficulty is encountered, however, in dealing with the third hypothesis, which is a stage intermediate between the two remissions already discussed.

REMISSION OF A PART TO THE BENEFIT OF ONE CODEBTOR

Instead of consenting to a division of the debt in favor of one of the solidary debtors, or of relinquishing the debt itself, the creditor may desire to discharge completely one of the debtors without affecting the debt or the others.¹⁸ According to Pothier, when one codebtor in solido is granted a complete discharge and the creditor intends to maintain the solidary debt as to the others, a personal remission¹⁹ or discharge is effected and the other codebtors remain liable.²⁰ Thus the intention of the creditor would be the sole criterion;²¹ the inquiry would be directed at determining whether the creditor intended to grant a discharge personal to the favored debtor, or to make a real remission of the debt.

Article 2203 of the Louisiana Civil Code, however, provides that a remission "in favor of one of the codebtors in solido,"²²

15. 2 Pothier, op. cit. supra note 3, at 128, n° 274.

16. See note 8, supra.

17. See note 9, supra.

18. As when A, B, and C are solidarily indebted to D for the sum of \$15,000, and D wishes to remit A's share, i.e., \$5,000, but to maintain his right against the other two.

19. Compare note 8, supra.

20. They remain liable only for the remainder after deduction is made of A's part. 5 Demante, op. cit. supra note 3, at 231, n° 144 bis. I; 2 Pothier, op. cit. supra note 3, at 129, 327, nos 275, 617.

21. 2 Pothier, op. cit. supra note 3, III^e partie, c. III, art. III, n° 585.

22. It is submitted that Article 2203 has no application to a remission of the debt (see supra, pp. 368-369), since that would be in favor of *all* the codebtors, even though notification be given to only one of them; but the result would be the same as to the other codebtors, in the absence of an express reservation of right.

discharges all the others,²³ unless the creditor has expressly reserved his right against the latter." In other words, it is conclusively presumed that the creditor intended to discharge all,²⁴ unless he has contravened such assumption by a specific reservation²⁵ of right against the other codebtors. This presumption was probably incorporated in the Code²⁶ in order to avoid the difficulties of determining intention encountered under Pothier's theory.

Therefore, following Article 2203 the result under the third hypothesis²⁷ would be the same as when the creditor has discharged the entire debt; all of the codebtors would be released.

SUMMARY AND CONCLUSION

Adverting to the case of *Fridge v. Caruthers*²⁸ and the suggestion of conflict between Articles 2100 and 2203, the position of the Chief Justice that these articles are not in conflict seems entirely sound. Although under Article 2203 a personal discharge granted to one solidary debtor will operate to release the other debtors in the absence of an express reservation, yet when the creditor merely consents to a division of the debt in favor of the one, a reservation is unnecessary to maintain the creditor's right against the other debtors. Of course, to find Article 2101 applic-

23. Where a tort action was brought against two defendants, and was dismissed as to one of them because he was not at fault, it has been held that since the discharged defendant was not plaintiff's debtor, the remaining defendant was not released under Article 2203. *Vredenburg v. Behan*, 33 La. Ann. 627 (1881); *Hall v. Allen Mfg. Co.*, 133 La. 1079, 63 So. 591 (1913); *Martin v. Sterkx*, 146 La. 489, 83 So. 776 (1920).

24. Under Article 2203 of the La. Civil Code of 1870 all complete discharges, whether of the debt or of the individual, are presumed to be *real*, unless there was an express reservation or the receipt was made in strict accordance with Article 2101.

On referring to Article 1285 of the French Civil Code, 18 Laurent, *op. cit.* supra note 6, at 395, n° 369, states: "*Ainsi la remise est réelle en principe, elle n'est personnelle qu'en vertu d'une réserve expresse.*"

(Translation) "Thus remission is *real* in principle, it is *personal* only by virtue of an express reservation." (Italics supplied.)

25. Although the reservation required by Article 2203 must be express, there is nothing sacramental about the form by which a creditor reserves his rights, it being sufficient that his intention to do so is made clear. *Cusimano v. Ferrara*, 170 La. 1044, 129 So. 630 (1930) (release was granted "with full and complete reservation of all my rights against all other judgment debtors in said suit"); *Landry v. New Orleans Public Service, Inc.*, 177 La. 105, 147 So. 698 (1933); *Williams v. De Soto Bank & Trust Co.*, 189 La. 245, 179 So. 303 (1938) (release with a reservation of "their claims of indebtedness, suit, and causes of action against the remaining defendants").

26. The requirement of a reservation of right in order to preserve the liability of the remaining codebtors after a discharge granted in favor of one, was first introduced into the French law by the Code Napoleon (1804).

27. *Supra*, p. 366.

28. See note 2, *supra*.

able it is necessary to discover an intention on the part of the creditor merely to divide the debt, not to discharge the favored debtor. The distinction is important practically because, as seen above,²⁹ if a solidary creditor consents to a division of the debt in favor of one debtor and thereafter one of the others becomes insolvent, the one in whose favor the debt has been divided must bear his proportion of the share of the insolvent.³⁰ Granting a full discharge to him, instead of merely dividing the debt in his favor, would prevent any subsequent recovery against him,³¹ regardless of the ability of the others to satisfy the obligation. Therefore, on the question of permitting further recovery against a solidary debtor who has paid his part to the creditor, a finding of whether the creditor has consented only to a division of the debt in his favor or has completely discharged him from the debt would be determinative.

The solution of the third situation under Article 2203 results inequitably when the creditor desires to hold the other codebtors, but fails through ignorance of a technical rule to make the reservation required. The necessity of such a stipulation would not be likely to occur to the average layman; so any complete discharge of one solidary debtor granted without legal advice would probably result in a release of the other codebtors from their just obligation through an artificial presumption of the law. This has been obvious in many of the cases decided under Article 2203 by the courts of Louisiana.³²

29. *Supra*, p. 368.

30. See note 12, *supra*.

31. In this event the creditor must suffer the loss, and if a reservation of right had been made, the other codebtors would be liable only for their shares plus their pro rata portion of the insolvent's. 14 Baudry-Lacantinerie et Barde, *Traité Théorique et Pratique de Droit Civil* (3 ed. 1908), Des Obligations III, 118, n° 1791; 8 Huc, *Commentaire Théorique et Pratique du Code Civil* (1892-1903) Bk. III, tit. III, c. V, n° 138; 2 Pothier, *op. cit. supra* note 3, at 134, n° 278.

32. *Harrison v. Poole*, 8 Rob. 202 (La. 1884); *Orr & Lindsley v. Hamilton*, 36 La. Ann. 790 (1884) (holding that any amount paid by one debtor on the score of damages in discharge of an obligation arising from their tortious acts, must discharge all of the debtors, in the absence of the reservation); *Case Threshing Mach. Co. v. Bridger*, 133 La. 754, 63 So. 319 (1913); *Fridge v. Caruthers*, 156 La. 746, 101 So. 128 (1924) (acceptance from one of four debtors in solido, of one-fourth of the total debt "in full settlement of his obligation" was held to release all the debtors); *George J. Bishop, Inc. v. Jones*, 17 La. App. 410 (1931) (a release granted to one debtor upon part payment, not stipulating for his part held to release codebtor); *Recile v. Southern United Ice Co.*, 17 La. App. 611 (1931); *Sly v. New Orleans, T. & M. Ry. Co.*, 142 So. 276 (La. App. 1932); *Reid v. Lowden*, 192 La. 811, 189 So. 286 (1939) (where a "full and final release in compromise settlement" was granted to one tortfeasor, co-tortfeasor held to be released also); *Crowell & Spencer Lbr. Co. v. Lacaze*, 188 So. 446 (La. App. 1939) (liquidation of a solidary debt by one debtor, who made part payment and agreed to make subsequent installments, discharged the other debtor).

In *Harrison v. Poole*,³³ for example, one cosigner of a promissory note was discharged in order to make his testimony available against the other in a suit on the note. There being no express reservation of right against the other codebtor in solido, it was held that he was thereby released. Since suit had already been filed, it is obvious that the creditor did not intend to discharge both; but no other result could be attained under the clear intentment of Article 2199 of the Code of 1825 (now Article 2203).

Baudry-Lacantinerie has criticized³⁴ the redactors of the French Civil Code for deviating from Pothier's theory of complete reliance on the intention of the creditor,³⁵ and there seems much merit in his position. If this presumption was incorporated in Article 2203 only to avoid difficulty in determining intention, the redactors were needlessly cautious. The subjective intention of the creditor need not be found; his objective intention, as manifested by the situation of the parties or by the creditor's words or actions, would supply an adequate and reasonably accurate test. In the absence of any such manifestation, the usual rule would be applied, that no one is ever presumed to have relinquished a right,³⁶ so that other codebtors could not sustain their burden of proving the discharge. Since the creditor who intends to discharge all of the solidary debtors almost invariably makes such intention clear, this solution would rarely work hardship; and the inequities which have abounded under the present law would be obviated.

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33. 8 Rob. 202 (La. 1884). The remission was made here because a party in interest could not testify.

34. 14 Baudry-Lacantinerie et Barde, *op. cit. supra* note 31, at 118, n° 1791. Cf. 26 Demolombe, *Cours de Code Napoléon* (1875) Bk. III, tit. III, c. IV, n° 396. But see 5 Larombière, *Théorie et Pratique des Obligations* (nouvelle ed. 1885) art. 1285, n° 13.

35. See note 21, *supra*.

36. 5 Demante, *op. cit. supra* note 3, at 232, n° 144 bis. II; 17 Laurent, *op. cit. supra* note 6, at 347, n° 346; 4 Marcadé, *op. cit. supra* note 11, Bk. III, tit. III, n° 621; 2 Pothier, *op. cit. supra* note 3, at 131, n° 277. *Micaud v. Johnson*, Man. Unrep. Cas. 327 (La. 1880); *Landry v. New Orleans Public Service*, 177 La. 105, 147 So. 698 (1933); *Williams v. De Soto Bank & Trust Co.*, 189 La. 245, 179 So. 303 (1938).